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U.S. Department
of Transportation

Federal Aviation Administration
Office of Aviation Policy and Plans

Washington, D.C. 20590

FAA-01-7018-122

**REGULATORY EVALUATION,
REGULATORY FLEXIBILITY DETERMINATION,
INTERNATIONAL TRADE IMPACT ASSESSMENT, AND
UNFUNDED MANDATES ASSESSMENT**

FEES FOR FAA SERVICES FOR CERTAIN FLIGHTS

**Final Rule
(14 CFR part 187)**

OFFICE OF AVIATION POLICY AND PLANS

August 8, 2001

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EXECUTIVE SUMMARY

This regulatory evaluation examines the economic implications of the Federal Aviation Administration's (FAA) Final Rule for user fees for air traffic control (ATC) and related services provided to aircraft flights that transit U.S.-controlled airspace but do not land in or take off from the United States (referred to herein as "Overflight Fees"). The Interim Final Rule (IFR) for these fees was published on June 6, 2000. Operators of these flights did not pay for such services prior to the implementation of the IFR.

Continuation of these fees will impose no additional costs on society other than the cost to collect the fees. The effect of the rule will be to collect the cost of providing and making available certain ATC and related services from the user of the services. The FAA's Overflight Fee development methodology ensures that the agency will not bill more than the cost of providing the ATC and related services, including billing and collections covered by the Final Rule. Also, the FAA will not bill the operators for whom the cost of billing and collections (set in the Final Rule at \$250) exceeds the cost of providing the ATC and related services. The total cost of collecting the fees is relatively small compared to the revenues that are expected to be generated by the fees.

During the first 12 months of the rule, the FAA expects to bill approximately \$33.5 million in fees. The FAA's estimated annual cost of billing and collections associated with this rule is \$1 46 million. Both of these estimates are reductions from those presented in the IFR published on June 6, 2000. As stated in the Final Rule, the FAA intends to update its fees at least once every two years to reflect changes in the costs of providing services to Overflights.

Several benefits are being realized from the imposition of these fees. The fees establish a mechanism whereby the users pay for the cost of resources used in providing or making available certain ATC and related services. These revenues are being used to fund the Essential Air Service (EAS) program, as directed by Congress (49 U.S.C. 41742). For these reasons, charging Overflight Fees is expected to result in a more efficient allocation of scarce public resources. The more efficient allocation of resources benefits the public at large because more resources are available for other services demanded by the public and because the EAS program is being funded with fewer tax dollars.

The Overflight Fees primarily affect foreign users, particularly commercial operators. Since the Regulatory Flexibility Act applies only to domestic entities and not to foreign entities, no consideration of the Final Rule's impact on foreign users is required. In addition, the FAA believes that the effect of the Final Rule on small domestic operators is negligible.

The Overflight Fees may have a favorable competitive impact on U.S. commercial operators.

Prior to the implementation of the Overflight Fee IFR, U.S. commercial operators were at a competitive disadvantage with foreign counterparts when users (U.S. and foreign) paid user fees to transit other countries' airspace while foreign users did not pay fees to transit U. S.-controlled airspace.

This rule does not contain any Federal intergovernmental or private sector mandates. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

I. INTRODUCTION AND BACKGROUND

A standard and generally accepted concept of equity in financing services is that those who benefit directly from a service should pay for it. In many government endeavors, there are fees levied on direct beneficiaries for the services they receive or for services made available for their use.

This regulatory evaluation examines the economic implications of the Federal Aviation Administration's (FAA) Final Rule for user fees for air traffic control (ATC) and related services provided to aircraft flights that transit U.S.-controlled airspace but do not land in or take off from the United States (referred to herein as "Overflight Fees"). The Interim Final Rule (IFR) for these fees was published on June 6, 2000. Operators of these flights did not pay for such services prior to the implementation of the IFR.

The FAA will continue to impose Overflight Fees under this Final Rule for aircraft flights that transit U.S.- controlled airspace but do not land within or take off from the United States. The FAA, in continuing these fees, will continue to bill only the directly related costs of providing services to those flights. Up to \$50 million of these revenues are being used annually to fund the Essential Air Service (EAS) program as directed by Congress (49 U.S.C. 41742).

Authority to establish these fees can be found in the Federal Aviation Reauthorization Act of 1996 (the Act), which directs the FAA to establish a fee schedule and a collection process for air traffic control and related services provided to aircraft, other than military and civilian aircraft of the U.S. government or of a foreign government, that transit U.S.-controlled airspace but neither take off from, nor land in, the United States (49 U.S.C. 45301, as amended by P.L. 104-264).

On March 20, 1997, the FAA published an IFR establishing a fee schedule and collection process for Overflight Fees. The IFR stated that the cost of FAA services provided to Overflights contained both incremental costs (costs that increase as service increases) and fixed and common costs (costs for facilities and other costs that could not be attributed to particular flights or classes of flights).

On January 30, 1998, the United States Court of Appeals for the District of Columbia (court) vacated the IFR fee schedule and remanded the IFR to the FAA for disposition (*Asiana Airlines et. al., versus the Federal Aviation Administration*, 134 F.3d 393(D.C. Cir.1998)). Although the court found that the FAA adopted procedures consistent with the statutory requirements, it concluded that the method used by the FAA to allocate costs violated the statutory direction that the fees be directly related to costs. On July 24, 1998, the FAA published a Final Rule that removed the 1997 fees and collection procedures from FAA's regulations.

On June 6, 2000, the FAA published a new IFR in the Federal Register with a request for comments and notice of public meeting. To ensure that the fees are directly related to the cost of the services provided (as required by the Act), the FAA used the best available data to capture the costs of Enroute and Oceanic Services. These costs were determined using the FAA's Cost Accounting System (CAS). The revised IFR established fees for Overflight services consistent with the Act, and the FAA began charging fees on August 1, 2000. The FAA held a public meeting on June 29, 2000, and has received numerous comments on its IFR. The FAA addresses those comments in the Final Rule document.

II. FINAL RULE

The Final Rule reduces overflight fees from the amounts established in the IFR and allows the FAA to continue to collect fees for the costs it incurs in providing and making available certain ATC and related services. The reduction is attributable to accounting adjustments and more refined billing and collection cost estimates. Upon further review of its fiscal year (FY) 1999 financial statements, the FAA determined that approximately \$267.3 million of FY 1999 costs had been expensed when they should have been capitalized and depreciated over a number of years. Therefore, operating expenses were overstated and depreciation expenses were understated. The specifics of this adjustment are explained in the preamble to the Final Rule. Also, the billing and collection costs were reduced by about 17 percent, based on approximately 8 months of actual operational experience under the IFR. The net result of these cost

adjustments is an approximate 10-percent reduction in the Enroute fee and a 20-percent reduction in the Oceanic fee.

The FAA estimates that approximately 236,000 non-public flights transit through U.S.-controlled airspace annually. This rule applies to many of these flights. Military and civilian aircraft operators of the U.S. government or foreign governments are exempt. Aircraft operators of Canada-to-Canada domestic flights are also exempt due to an intergovernmental agreement between the U.S. and NAVCANADA.

The level and type of ATC and other related services provided to Overflights are related in part to the length of the flight and the portions flown in Enroute or Oceanic airspace. These services can include, but are not limited to, communications, navigation, radar surveillance, emergency services, and flight information services. Generally, for aircraft transiting U.S. Enroute airspace, Air Route Traffic Control Centers provide separation by means of radar surveillance (if they are operating under instrument flight rules or generally in airspace above 18,000 feet). These flights also use navigational aids and direct radio communications with Air Route Traffic Control Centers.

For aircraft transiting Oceanic airspace, navigation is conducted primarily by on-board systems because radar surveillance and navigational aids are generally not available. However, radar service is available in certain Oceanic areas, for which the FAA charges a higher fee consistent

with the more costly service that is available. Separation of aircraft in the Oceanic environment is usually provided by FAA under procedural control, as flights report their position to an air traffic controller each time they fly over a specified reporting point.

Charging fees is an accepted international practice. The International Civil Aviation Organization has stated that air navigation service providers may require users to pay their share of costs whether or not utilization takes place over the territory of the provider state.

For example, a flight from Copenhagen, Denmark to Rio de Janeiro, Brazil, would usually pass through airspace controlled by France, Portugal, the United States, the Netherlands Antilles, and Venezuela, in addition to airspace controlled by Denmark and Brazil. Prior to August 1, 2000, the operator would have been charged by all countries except the United States for air traffic and related services. Similarly, a flight bound from Mexico to Frankfurt, Germany, would pay fees to Mexico, Canada, Denmark (for overflying Greenland), the United Kingdom, the Netherlands or Belgium, and Germany. This operator would not have paid any user fees for ATC services to the United States prior to August 1, 2000. As is evident from these two examples, there are international precedents for charging Overflight aircraft the cost of providing ATC services.

As stated in the Final Rule, the FAA intends to update its Overflight Fees at least once every two years to reflect changes in the costs of providing services to Overflights.

III. ANALYSIS OF BENEFITS

Several benefits are being realized from the imposition of these fees. The fees establish a mechanism whereby the users pay for the cost of resources they use. These revenues are being used to fund the EAS program, as directed by Congress. For these reasons, charging Overflight Fees is expected to result in a more efficient allocation of scarce public resources. The more efficient allocation of resources benefits the public at large because more resources are available for other services demanded by the public and because the EAS program is being funded with fewer tax dollars.

IV. COST TO THE FAA OF BILLING AND COLLECTION OF USER FEES

The effect of the rule will be to continue collecting the cost of providing and making available certain ATC services from the user of the services. The FAA estimates that the annual cost of billing and collections associated with this rule is \$1.46 million. This includes a one-time development cost of \$1.47 million (which is being amortized over 2 years beginning with the implementation of the IFR) and an annual operating cost of approximately \$725,000. This is a reduction from the IFR billing and collection costs.

The cost of billing and collections is planned to be reviewed at least once every 2 years and user fee rates will be subject to adjustment to reflect the current costs of providing Overflight services. The next review will be conducted no later than 2 years from the date of publication of the Final Rule.

V. COSTS AND FEES FOR FAA OVERFLIGHT SERVICES

A. Costs of Air Traffic Control Services for Aircraft That Overfly U.S.-Controlled Airspace

The respective costs for providing Enroute and Oceanic ATC service to Overflights were derived from the FAA's Cost Accounting System (CAS). The CAS is described in the "Costing Methodology Report," a report prepared by the accounting and professional services firm of Arthur Andersen. A copy of the report is included in the docket (item 6). The report explains the methodology used to determine the costs of ATC and related services in the Enroute and Oceanic environments.

In support of the Final Rule, the FAA created another document entitled "Overflight Fee Development Report (Amended)," which explains the derivation of the fees. This document is

also included in the docket. Estimated Overflight Fee billings (including cost of billing and collections) are presented in Table 1.

TABLE 1 ESTIMATED OVERFLIGHT BILLINGS (In Millions of Dollars)		
U.S. CONTROL ENROUTE	U.S. CONTROL OCEANIC	U.S. CONTROL TOTAL
\$17.8	\$15.8	33.5*

Source: U. S. Dept. of Trans., FAA, ABA, April, 2001

*Displayed numbers do not total 33.5 due to rounding

While the total cost of Overflights (including the cost of billing and collections) is \$43.2 million, total expected billings are approximately \$33.5 million. This difference is attributable to an FAA/NAVCANADA agreement, whereby, for reasons concerning traffic management and safety, the FAA does not charge Canada-to-Canada flights and NAVCANADA does not charge most U.S.-to-U.S. flights.

B. Air Traffic Service Fee for Aircraft That Overfly U.S.-Controlled Airspace

The Overflight Fees are computed based on the distance flown through U.S.-controlled airspace. Separate computations are made for services in the Enroute environment and for services in the

Oceanic environment to reflect the differences in the level and type of ATC and related services provided in each of these environments.

The FAA has established and maintains a database that identifies the point of entry and exit, aircraft registration number, and the type of aircraft for all aircraft entering U.S.-controlled airspace. Information needed to compute the Overflight Fees is extracted from this database. As established in the IFR, the total charge for a flight is computed by a formula based on the Great Circle Distance (GCD) flown through U.S.-controlled airspace. The distance is determined by the actual point of entry into and the actual point of exit from each type of U.S.-controlled airspace. This process remains the same for the Final Rule.

The FAA will charge users \$33.72 per 100-nautical miles flown in the Enroute airspace and \$15.94 per 100-nautical miles flown in the Oceanic airspace. These are reductions from the rates in the IFR. These unit costs were determined by dividing the costs incurred by the FAA in FY 1999 to provide ATC and related services within each type of airspace by the total number of air traffic miles flown in each respective airspace during FY 1999. Because the level and type of ATC and related services is highly similar for all aircraft operations within the respective Enroute and Oceanic environments, these unit costs reflect the directly related costs of providing services to Overflights on a per 100-nautical-mile basis. See the "Overflight Fee Development Report (Amended)" for further details regarding the FAA's fee development methodology.

The fees for users are calculated as follows:

$$R_{ij} = (DO_{ij} \times CO) + (DE_{ij} \times CE)$$

Where

R_{ij} = the fee charged to aircraft flying between entry point i and exit point j.

DO_{ij} = great circle distance traveled in each segment of U.S.-controlled Oceanic airspace expressed in 100 nautical miles for aircraft flying between entry point i and exit point j.

CO = \$15.94 per 100 nautical miles flown in Oceanic airspace.

DE_{ij} = great circle distance traveled in each segment of U.S.-controlled Enroute airspace expressed in 100 nautical miles for aircraft flying between entry point i and exit point j.

CE = \$33.72 per 100 nautical miles flown in Enroute airspace.

Although the fees are based on the costs of making ATC and related services available to each Overflight, no fee will be charged unless the accumulated monthly charge to the user equals or exceeds \$250. This cut-off is an administrative determination based on the cost of identifying, billing, and collecting small amounts from aircraft operators outside the United States.

The FAA expects to bill approximately \$33.5 million in Overflight Fees during the first 12 months of this rule, beginning with the implementation of the IFR on August 1, 2000. These fees reflect the costs associated with providing ATC services, including billing and collections, for these flights. The Overflight Fees, including the cost of billing and collections, will not exceed the actual costs of providing services to Overflights. The FAA believes the fees are equitable and justified as well as consistent with the Act.

VI. REGULATORY FLEXIBILITY DETERMINATION

The Regulatory Flexibility Act of 1980 (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.” To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if the agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Overflight Fees primarily affect foreign users. Since the RFA applies to domestic entities and does not apply to foreign entities, the FAA certifies that this rule will not have a significant economic impact on a substantial number of domestic small entities. For this reason, the FAA believes that the effect of the Final Rule on small domestic operators will be negligible.

VII. INTERNATIONAL TRADE IMPACT ASSESSMENT

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

The Final Rule will primarily affect foreign users, generally commercial operators. Many commercial aircraft are designed to operate more efficiently at altitudes above 18,000 feet. All aircraft operations at altitudes of 18,000 feet or above controlled by the United States must use ATC. The FAA believes that it is highly unlikely that foreign commercial users will alter their behavior to avoid using ATC and related services (although there are some questions about

foreign non-commercial users). In addition, to some extent, commercial users are able to pass the Overflight Fees on to their passengers and cargo customers.

The Final Rule may have a favorable competitive impact on U.S. commercial operators. Prior to implementation of the June 6, 2000, Overflight Fee IFR, U.S. commercial operators were at a possible competitive disadvantage with foreign counterparts when users (U.S. and foreign) paid user fees to transit other countries' airspace while foreign users did not have to pay a fee to transit U.S.-controlled airspace. The Final Rule could enhance the competitiveness of domestic commercial operators in international markets.

VIII. UNFUNDED MANDATES ASSESSMENT

The Unfunded Mandates Reform Act of 1995, enacted as Pub. L. 104-4 on March 22, 1995, is intended, among other objectives, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in expenditures of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

This Final Rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.